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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 712

THOGER GRONBORG JUNGERSEN,
Petitioner,

against

AXEL BROS., INC., *et al.*,
Respondents,

and

HARRY COHAN, *et al.*,
Defendants.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated New York, N. Y.
April 26, 1955.

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Respondents,
and
HARRY COHAN, MAX COHAN, DAVID SELIKOFF, LOUIS WITKIN, ALBERT FOSS, ANNIE BERLAND, LOUIS DOLGOV and ROSE BADEN,
Defendants.

No. 712

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court for the Southern District of New York (R., fs.* 550-584) is reported in 121 F.

* References to the Record in this case will be to the folio rather than the page numbers in order more exactly to pinpoint the cited matter, thus "R., f. ——". References to the record in *Jungersen v. Baden, et al.*, No. 48, October Term, 1948, will be to "*Baden*, p. ——". Jungersen's petition here will be referred to as Peto., p. ——".

Italics and parentheses within quotes are ours throughout, unless the contrary is indicated.

Supp. 712. The Court of Appeals for the Second Circuit affirmed, *per curiam* (Peto., p. 67, Ex. D).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. A. Rule 60(b).

The jurisdiction of this Court is founded on 28 U. S. C. §1254(1).

Rules and Statutes Involved

Rule 56, Rules of Civil Procedure

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . .

Statement

This action sought to set aside, for alleged fraud, a judgment of the District Court for the Southern District of New York in *Jungersen* v. *Baden, et al.* The judgment in that case, rendered April 22, 1947, had held Jungersen patent No. 2118468 invalid.

Defendants here moved for summary judgment (R., fs. 31-32) and that motion was granted (R., fs. 586-588), the rationale of the District Court's decision being expressed in the following statement (R., f. 579; 121 F. Supp. 717):

> "From an analysis of the alleged perjurious testimony and of the decisions herein it is apparent that

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> the findings and opinions of the District Court, the Court of Appeals and the Supreme Court were based entirely on grounds independent of matters with which defendants Tour and Baden's testimony was concerned. No manifest injustice can result from the enforcement of a judgment of invalidity which was based on unchallenged matter."

The decision of the District Court in the earlier infringement case, the *Baden* case (R., fs. 131-174), is reported in 69 F. Supp. 922. After full hearing, it was affirmed by the Court of Appeals for the Second Circuit (R., fs. 175-210, and 166 F. 2d 807), and then by this Court (R., fs. 211-250, and 335 U. S. 560).

Jungersen's petition here states that "The ground for seeking to set aside the judgment [in the *Baden* case] is fraud practiced upon petitioner and the trial court, in the form of prearranged false testimony by the defendants' sole expert witness and others, which was intended to and did mislead the court by a false showing of want of invention" (Peto., p. 3).

In the District Court, in the instant action, Jungersen's case rested, substantially entirely, on two affidavits filed by him (R., fs. 463-503 and 514-537). These affidavits make little pretense of being "made on personal knowledge", and, in the overwhelming majority of cases, they certainly do not "set forth such facts as would be admissible in evidence" or "show affirmatively that the affiant is competent to testify to the matters stated therein", as required by Rule 56(e).

Briefly summarized in the words of Jungersen's petition here, Jungersen asserts that defendants' expert, Sam Tour, "testified, with respect to a prior patent, called the Kralund patent [Kralund No. 1238789, one of the prior patents relied on by the *Baden* defendants] that he had worked with Kralund on the process, that the Kralund patent preceded and was substantially the same as Jungersen's, could do the same things and make the same articles, and that it

was a practical, operative, commercially successful method of precision casting used in production at the Doehler Die Casting Company", and that "Tour was presented as a witness with no interest in the outcome of the action, whereas in fact, he was then employed by Ostby & Barton Company . . ." (Peto., p. 6).

The last facet of these charges is frivolous and without consequence. Tour was presented as an expert in the casting art. (*Baden,* pp. 147-150); his prior connection with Ostby & Barton was well known (*Baden,* p. 167); his testimony in *Jungersen* v. *Ostby & Barton, et al.,* and in the *Baden* case was to "the same effect" (R., f. 416; *Baden,* p. 167) and, in the *Baden* case, he wasn't even asked as to his obvious relationship with Ostby & Barton (*Baden,* pp. 167-171, 181-182).

Therefore, the only remaining part of Jungersen's charges is that concerned with Kralund and Doehler. And, in order to bring it into focus—and, at the same time, demonstrate its entire lack of substance—some background must be given.

At the hearing in the *Baden* case, the *sole* defense was that the Jungersen patent was invalid in view of seven prior patents or publications.* Tour, of course, testified with respect to the disclosures of this prior art. Jungersen's petition, here, quotes the great bulk of this testimony (Peto., pp. 7-23). With a single exception, Tour's testimony is simply a paraphrase of what is written on the face of those patents or publications, and its accuracy has not been and cannot be challenged.

The sole exception is found in his testimony that, more than twenty years earlier, he had known John Kralund and had worked with him at Doehler; that he had done some *experimental* work with him "in connection with this

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* Originally, two prior uses were urged but neither was upheld (Findings 13 and 16, R., fs. 265-267) and both were abandoned before appeal.

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particular [Kralund] method" (R., f. 425; *Baden,* p. 154), and that the Kralund method was a practical and operative one which "has been applied very extensively during *this war* [i.e., World War II] to the casting of millions of small articles" (R., fs. 426-428; *Baden,* pp. 153-156).

Though this testimony, of course, had been under oath and Tour had been subjected to cross-examination (*Baden,* pp. 167-171, 181-182), Jungersen challenges it solely on the basis of an affidavit executed October 19, 1948, by one Charles Pack (R., fs. 277-291). And Pack, *not subject to cross-examination,* dictated his affidavit, according to Jungersen, *"from memory"* (R., f. 500). So far as pertinent, it stated that Kralund did no experimental work "on wax castings" after 1915 and that "Mr. Tour at no time was under the direction of Mr. J. Kralund, nor did he at any time collaborate with Mr. Kralund on any research or experimental work" (R., fs. 289, 291).

While Jungersen must have talked to Pack at least as early as the general period of the District Court decision in the *Baden* case, that is, around April 1947 (see Compl., Para. Seventeenth, R., f. 25), the Pack charges became known to the Baden defendants only the day before the *Baden* case was argued in this Court in November 1948 (see Jungersen's Reply Brief in *Jungersen* v. *Ostby & Barton, et al.,* p. 4, fn.; R., f. 276). Immediately thereafter, Pack was approached and, having had an opportunity to refresh his recollection by the examination of various records, papers, etc., gave a second affidavit (R., fs. 304-309), which showed that his "memory"—the sole basis for his first affidavit—had been as fallible as memory often is. In this second affidavit Pack admitted that Kralund and Tour had worked together at Doehler; that Tour's work there "may have been somewhat broader" than his assigned duties—and thus may have included research or experimental work with Kralund; and that he did not mean to imply by his earlier affidavit "that Mr. Kralund and Mr. Tour could not have talked of said Kralund process or of experimental

work in connection therewith, because as to this [he had] no knowledge" (R., fs. 308-309).

In the light of the second Pack affidavit, the entirely unreliable nature of the first Pack affidavit is manifest. And in asking this Court to grant his Petition, which finds its sole substantiation in Pack's first affidavit, Jungersen asks this Court to consider that affidavit *for the third time.* For, following this Court's decision in the *Baden* case, Jungersen, on January 27, 1949, appearing *pro se,* filed a "Motion for Leave to File Petition for Reconsideration" (R., fs. 313-363), which relied largely on that affidavit and apparently other material (R., f. 322). Jungersen's motion was denied on February 14, 1949 (336 U. S. 915) and on February 25, 1949, Jungersen filed in this Court a further "Petition for Reconsideration" (R., fs. 364-386), which, *inter alia,* contained the statement that "If furnishing proof of the testimony in the case being false or misleading is not grounds for at least having the case reconsidered then it seems that justice is a meaningless word" (R., f. 368). Notwithstanding this, on March 14, 1949, this petition also was denied (336 U. S. 932). The charges made in Jungersen's motion and his petition are substantially the same as those in the complaint here (R., fs. 324-340, 368-369, 382-384).

The present action is simply another attempt, long after the event, to relitigate a matter which has never had substance, which has been finally determined against Jungersen and which in any event has been stale for more than five years.

Argument

The petition (Peto., p. 2) poses two questions, viz.:

Was it error, in a case like the instant one, to accept the allegations of perjury and its subornation but to dismiss the suit on the ground that, even if perjury existed, it was neither material nor relevant to the grounds upon which the earlier judgment was rendered; and

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Is the decision of the District Court and, by adoption, that of the Court of Appeals in this case, in conflict with applicable decisions of this Court?

Even if it be assumed, contrary to the fact, that perjury had been committed, as alleged, it is clear that a fraud *in vacuo* and without effect is of no consequence and will be disregarded. Similarly, it is clear that the decisions below are in full accord with all applicable decisions of this Court.

Fraud, If Any, Was Immaterial

The record here clearly shows there has been no fraud. The complaint and the supporting affidavits of Jungersen are simply empty charges* which are entirely unsupported by anything which might raise a "genuine issue as to any material fact" as required by Rule 56(c).

Beyond this, the complaint and the affidavits relate to matter which is utterly inconsequential to any of the decisions in the earlier litigation. As indicated earlier, the defenses in that litigation were based solely on prior patents or prior publications. And so, too, are the three decisions in the *Baden* case, as analysis of them unanswerably demonstrates.

The decision of the District Court (R., fs. 131-174) outlines in detail the disclosures of the various prior references (R., fs. 149-157), Jungersen's own testimony as

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* Large parts of the Jungersen affidavits are purely argumentative (R., fs. 464-467, 469-474, 478-480, 492-503, 515-537). Other parts, such as his difficulties with the Internal Revenue Bureau and certain alleged occurrences in Los Angeles, which admittedly had no part in the *Baden* case (R., fs., 477-478, 489-490), are utterly irrelevant. And in a number of cases the petition here relies on asserted facts which aren't even in this record (see Peto., pp. 6, 27, 31 regarding the asserted loss of busines of Ostby & Barton; Peto., p. 32 regarding Met-Chem Corporation and its asserted fees or commissions; and Peto., pp. 20-21 regarding the asserted action of the War Production Board *in 1946*, which, in view of the issue of the Jungersen patent *in 1939*, is ridiculous).

to his alleged invention (R., fs. 158-159), and notes particularly the admissions contained in his British patent, which corresponded to the patent in suit (R., fs. 159-160). And, on the basis of these facts, it concluded that

> "The novel feature of the Jungersen process relates to the casting of the primary pattern in wax or other fusible material. He injects the wax into the primary mould by centrifugal force" (R., f. 165).

But, the Court showed that the use of force for the casting of metal was old and that the Kralund patent used force for casting the wax (R., fs. 166-170). On these inescapable predicates the District Court concluded "that the claims are all invalid because anticipated and for want of invention" (R., f. 174).

To the same effect is the decision of the Court of Appeals (R., fs. 175-210). That opinion, after adverting to the admissions of Jungersen's British patent (R., fs. 186-187), said:

> "It is clear from this admission that all but the use of centrifugal casting to force the wax and the metal into their respective moulds was deemed old" (R., f. 187).

It then stated the problem——

> "Thus plaintiff's patent can be sustained only if the use of force to cast the wax and the metal is such a change of a known method as to amount to invention . . ." (R., f. 189).

and, answering it, said:

> "We think it is not. Indeed, the use of applied force to cast metal was shown in several patents prior to the plaintiff's" (R., f. 189).

These "several patents" it then considered in detail (R., fs. 189-191), and concluded that "The combination of such known elements is not invention" (R., f. 199).

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This Court's decision, by Mr. Justice Reed, shows the same reliance upon the printed or patented art as had the decisions of the two lower courts (R., fs. 211-250). At the outset it was said that

> "An examination of the prior art as it existed at the time of this alleged invention reveals that every step in the Jungersen method was anticipated. We think that his combination of these steps was, in its essential features, also well known in the art" (R., f. 223).

That art was then analyzed to show that the general—the lost wax—system was well known and that

> "Long before the issuance of this [Jungersen] patent, however, those skilled in the art recognized and disclosed the necessity for the application of force in order to make molten materials fit snugly the intricate details of the mould" (R., fs. 224-227).

Consideration then was given to the prior patents and publications which had disclosed just that, e.g., Haseltine, Kralund, McManus and Mortimer (R., fs. 227-230). With respect to Jungersen's contention that the use of centrifugal force to force the wax into the primary mold was new, this Court said,

> "We think this fact is of no legal significance. Where centrifugal force was common as a means of introducing molten metal into the secondary mould, its use in an intermediate step to force molten wax into the primary mould was not an exemplification of inventive genius such as is necessary to render the patent valid" (R., fs. 230-231).

The patent in suit was invalidated because it did not disclose invention, and this result would have been impelled even if the Kralund patent had not been in the case. In any event, it is entirely manifest from all three of the opinions in the *Baden* case that Tour's testimony with respect to his experience at Doehler had nothing to do with the result, and it is equally manifest that if the earlier case

were reopened for any reason at all, a rehearing would compel the conclusion there reached.*

It is clear that a fraud which is without effect of any nature, even if proved, would afford no basis for reopening. Such basis is found only where the fraud has been proved and has been shown to have been material. *Pence* v. *United States,* 316 U. S. 332, 338. Thus, in *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, this Court refused to reopen an earlier judgment because it did not "appear that the fraud charged really prevented the party complaining from making a full and fair defense" (261 U. S. 421). To the same effect, certain averments in that case were disregarded as irrelevant because "they are not shown to have had any causal connection" with the failure of the petitioner to make its case (261 U. S. 423). Here the Jungersen patent was invalidated because it did not show invention over the disclosures of prior patents and publications and here Tour's testimony prevented Jungersen from doing nothing that he could have done to validate the invalid. Here there is no "causal connection" between the invalidity of the Jungersen patent and anything testified to by Tour.

To much the same effect is the statement of this Court in *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, 245. There the question was whether the plaintiff had been guilty of unclean hands, which, if established, amounted to fraud. The Court said (p. 245):

> "But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief *has immediate and necessary relation* to the equity that he seeks in respect of the

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* The petition here, in effect, concedes this in its statement that "We are concerned here, not with the validity of a patent, nor with the soundness or otherwise of a judgment" . . . (Peto., p. 37) and "Whether or not it can be said that a retrial of the infringement suit . . . would again result in a decision of invalidity . . . it may not operate to mitigate or excuse defendants' fraud" (Peto., p. 41).

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> matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication."

The non-existent fraud which is here alleged had nothing to do with the decisions and gives no reason for reopening.

The Decisions Below are not in Conflict with any Decision of this Court.

Petitioner's sole contention on this score is that the decisions below are in conflict with the decision of this Court in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238.

In fact, there is no conflict.

It would seem a work of supererogation to review that decision in any detail. Suffice it now to note that in 1926 Hartford was having rough sledding in the prosecution of a patent application relating to a method of glass blowing. To surmount this difficulty, it caused an article extolling the method to be prepared and published and caused this article to be signed by the president of a glass blowing labor union who had had nothing to do with its composition (322 U. S. 240). The article won over the Patent Office, the patent issued, and Hartford sued Hazel for infringement. In the District Court the article was not relied on and Hartford lost. Upon appeal, the article was brought before the Court and the latter, heavily relying on it, reversed (322 U. S. 241). Years later, after the fraud had been clearly exposed, Hazel moved to reopen and set aside the earlier judgment (322 U. S. 243). The Court of Appeals for the Third Circuit denied the motion (137 F. 2d 764) and this Court reversed.

The decision of this Court in the *Hazel* case clearly establishes the right of a court to reopen a judgment

tainted with fraud, without regard to the term. That decision does not establish, however, that the mere allegation of fraud, or even the proof of immaterial fraud, is sufficient.

Three essential distinctions between the *Hazel* case and this case are illustrated by the following quotation from this Court's decision (322 U. S. 245-246):

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Cf. *Marshall* v. *Holmes, supra.* Proof of the scheme, and of its complete success up to date, is conclusive. Cf. *United States* v. *Throckmorton, supra.*"

(1) The *Hazel* case was *not* one involving "a judgment obtained with the aid of a witness who . . . is believed possibly to have been guilty of perjury". Here, the most that can be said for Jungersen is that this *is* such a case.*

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* In Jungersen's complaint and in his affidavits he charged that Tour's testimony was part of a "plan" "to convince the trial court that each step in plaintiff's method *was anticipated* . . . [and] thus to deceive and defraud the court and to influence the court in holding plaintiff's patent invalid" (Compl., Paras. Twelfth, Thirteenth, R., fs. 19-21). Another part of the "plan", according to Jungersen, was the action of Baden, another witness, in having lied as to the date he commenced practicing the challenged method. Here again the charge is not substantiated, but in any event it is meaningless, since Baden testified to a date which was more than a year after the application for the Jungersen patent had been filed (cf. R., fs. 395 and 11).

In the petition here, however, substantially all phases of the "plan" are ignored (see, though, Peto., pp. 3, 30-31, 36) except for Tour's asserted perjury.

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(2) In the *Hazel* case the fraud was shown by "Hartford's sworn admissions" (332 U. S. 245, 250). There the essential facts "were shown by the record without dispute" (322 U. S. 240), and "proof of the scheme . . . [was] conclusive" (322 U. S. 246). And, again and again, this Court used such expressions as "indisputable proof" (322 U. S. 243), "undisputed evidence" (322 U. S. 247).

Here, in contrast, there is no proof, indisputable or otherwise, and here there are no admissions. The sole substantiation for Jungersen's charges is the first Pack affidavit and, to give this even the slightest effect, the second Pack affidavit must be utterly ignored. In this connection it is pertinent that an affidavit filed by one of Jungersen's counsel says he has studied "voluminous papers" and "conducted extensive investigations which entailed traveling to various states for the purpose of interviewing people who had knowledge which would effect [sic] the decision as to whether to institute this action" (R., fs. 506-507; see also, Peto., p. 38), but not one of the "papers" has been produced, and, for all his traveling, he has not produced a single witness to substantiate Jungersen's position.

(3) In the *Hazel* case "Proof of the scheme, and of its complete success up to date [was] conclusive . . ." And the conclusiveness is illustrated by the fact that the article certainly had overcome the "apparently insurmountable Patent Office opposition" to its issue (322 U. S. 240-241); its non-use in the District Court resulted in a lost case (322 U. S. 241) and its use in the Court of Appeals won the day (322 U. S. 241).

Here, even if a scheme had been shown—and there isn't a scintilla of evidence that there ever was one—it has been demonstrated that it had no effect of any nature on the result.

This case lacks every element which impelled the result in the *Hazel* case. The decisions below in no way conflict with the decision there.

Conclusion

The decisions below were correct. This case affords no reason for the award of a writ of certiorari.

Respectfully submitted,

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